

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
ROSENFIELD, et al., : 18-cv-06720-NGG-PK  
Plaintiffs, :  
- versus - : U.S. Courthouse  
LENICH, et al., : Brooklyn, New York  
Defendants :  
-----X  
ROSENFIELD, : **Docket#**  
Plaintiff, : 17-cv-7299-NGG-PK  
- versus - :  
LENICH, et al., :  
Defendant :  
-----X  
LEMIEUX, : **Docket#**  
Plaintiff, : 17-cv-7299-NGG-PK  
- versus - :  
LENICH, et al., : March 27, 2019  
Defendant : 10:07 AM  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PROCEEDINGS  
BEFORE THE HONORABLE PEGGY KUO  
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

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1                   THE CLERK: The Honorable Magistrate Judge  
2 Peggy Kuo presiding.

3                   Civil Cause for a Scheduling Conference, docket  
4 number 17-cv-7299, Rosenfeld v. Lenich. Civil Cause for  
5 a Scheduling Conference, docket number 18-cv-6720,  
6 Rosenfeld, et al. v. Lenich, et al. And Civil Cause for  
7 a Scheduling Conference, docket number 18-cv-6721,  
8 Lemieux v. Lenich, et al.

9                   Counsel, please state your name for the record,  
10 starting with the plaintiffs.

11                  MR. SHAPIRO: Good morning, your Honor.

12                  Sam Shapiro, Emery Celli Brinckerhoff & Abady  
13 for plaintiff Stephanie Rosenfeld, Danielle Rosenfeld and  
14 Vincent Garcia.

15                  MR. DOOLEY: Good morning, your Honor.

16                  Tadhg Dooley, Wiggin & Dana for plaintiff  
17 Jarrett Lemieux, and plaintiffs Danielle Rosenfeld and  
18 Garcia.

19                  MR. EMERY: Good morning.

20                  Richard Emery, along with Sam Shapiro for the  
21 same parties.

22                  MR. GLASSER: Good morning, your Honor.

23                  Jim Glasser, Wiggin & Dana on behalf of Jarred  
24 Lemieux, Mr. Garcia and Ms. Danielle Rosenfeld.

25                  MR. JACOBSON: Good morning, your Honor.

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1                   Glenn Jacobson in the Stephanie Rosenfeld case,  
2 17-cv-7299, and I have what I will call the City  
3 defendants and the Kings County DA defendants.

4                   MR. KIMMEL: James Kimmel with Mr. Jacobson's  
5 office, same defendant, same case.

6                   MR. LAX: On behalf of the City defendants in  
7 18-cv-6721 and 18-cv-6720, I am Joshua J. Lax, from the  
8 Office of Corporation Counsel.

9                   Good morning, your Honor.

10                  MR. SORKOWITZ: Good morning, your Honor.

11                  For Tara Lenich, Jonathan Sorkowitz of Pierce  
12 Bainbridge Beck Price & Hecht in all three of the matters  
13 that we're here for.

14                  THE COURT: All right. Good morning, everyone.  
15 So it's a little bit confusing to me who is representing  
16 whom because the -- I don't know if there have been  
17 changes but let me try to get this straight. Okay.

18                  So, Mr. Shapiro, you represent Stephanie  
19 Rosenfeld, Danielle Rosenfeld and Vincent Garcia.

20                  MR. SHAPIRO: Correct, your Honor.

21                  THE COURT: Not Jarrett Lemieux.

22                  MR. SHAPIRO: Correct.

23                  THE COURT: And Mr. Emery, you represent those  
24 same people.

25                  MR. EMERY: Same.

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1                   THE COURT: Okay. And Mr. Dooley --

2                   MR. DOOLEY: Yes.

3                   THE COURT: -- you represent those same people  
4 or the Lemieux plaintiff?

5                   MR. DOOLEY: Mr. Glasser and I represent Mr.  
6 Lemieux, apart from Emery Celli, and all of us represent  
7 the class plaintiffs, Danielle Rosenfeld and Mr. Garcia.

8                   THE COURT: I see. Okay, got it. And then Mr.  
9 Jacobson and Mr. Kimmel, you're not City Law Department  
10 employees.

11                  MR. JACOBSON: That's correct.

12                  THE COURT: Okay. But you're co-counsel with  
13 the City Law Department.

14                  MR. JACOBSON: Well, there was a conflict and  
15 we've been brought in specifically in the Rosenfeld case.

16                  THE COURT: I see.

17                  MR. JACOBSON: Stephanie Rosenfeld case.

18                  THE COURT: Got it. So you represent the --

19                  MR. JACOBSON: The City --

20                  THE COURT: -- defendants in that case.

21                  MR. JACOBSON: With the exception of Lenich.

22                  THE COURT: Got it. The City defendants in the  
23 Stephanie Rosenfeld.

24                  MR. JACOBSON: Yes.

25                  THE COURT: Okay. Great, Thank you for

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1 clarifying that.

2 MR. JACOBSON: You're welcome. Thank you.

3 THE COURT: So let me pull up the cases. So  
4 since our last conference, some things have happened.  
5 Judge Garaufis has granted in part and denied in part,  
6 the City defendants' motion to dismiss. There are  
7 several claims that have been dismissed but most of the  
8 claims have survived the motion to dismiss and so that  
9 case is ready to go full speed ahead.

10 In the 18-cv-6720 and 18-cv-6721 cases, there  
11 are motions to dismiss which are pending; is that  
12 correct?

13 MR. JACOBSON: They're currently still being  
14 briefed, your Honor.

15 THE COURT: Right. Okay. So I see the  
16 briefing schedule and there have been requests to change  
17 that, so by April 15th, the whole bundled motion with any  
18 responsive pleadings -- responsive filings will be filed.  
19 And the last time we were here, I also asked the parties  
20 to go ahead and do initial disclosures, so that we can  
21 get moving.

22 So I think what makes sense now and I've  
23 ordered the parties to confer and propose a discovery  
24 plan is for the discovery to move forward on the  
25 individual claims. I don't know that we should be moving

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1 forward on the class claims yet, as far as discovery but  
2 certainly in the interest of being efficient since the  
3 17-cv-7299 case is ready to move forward, I think the  
4 others can move forward at the same place. All right?

5 So I see that the parties have -- whether they  
6 agree with me or not, have actually complied with that  
7 and so the three proposed discovery plans seem to be in  
8 sync, all right?

9 So Mr. Shapiro, did you want to say anything  
10 before I go through what the parties have agreed to?

11 MR. SHAPIRO: Your Honor, I do think that we  
12 are prepared to proceed with the class -- the case  
13 discovery, as well. I think the liability discovery with  
14 respect to all three cases, is almost completely  
15 overlapping and we've discussed this amongst ourselves  
16 earlier this week and we went back and forth on some  
17 proposals about the best way to handle this. It is sort  
18 of a complicated situation as your Honor appreciates, I  
19 think.

20 What we would propose, and I'll just sort of  
21 say this up-front is that the three cases be consolidated  
22 for purposes of liability discovery. As I said, we  
23 believe the liability discovery is really the same in all  
24 three cases. We have sent over a proposed protective  
25 order to all of the defendants that they are looking at

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1 and commenting on.

2                   The concept is that everything -- every  
3 document that would be produced for liability could be  
4 used in all three cases. I think that would ease the  
5 burden on all parties to not have to reproduce the same  
6 document in all three cases. It would hopefully reduce  
7 some of the confusion.

8                   Damages discovery, however, would be done  
9 separately in all three cases. I think that could be  
10 done parallel with liability discovery. I don't think it  
11 would need to be done sequentially. They could all  
12 happen parallel but because the damages issues are unique  
13 across the three cases, particularly the individual  
14 cases, and speaking for Stephanie Rosenfeld, the City Law  
15 Department is conflicted out. We don't want to be  
16 producing damages documents, health records, things like  
17 that, to the City Law Department in the Stephanie  
18 Rosenfeld case.

19                   So that would be our concept in broad brushes  
20 and we have raised this with the defendants. I'll let  
21 them provide their view on that but that is the concept  
22 that we have discussed and that we think might make some  
23 sense here.

24                   THE COURT: Okay. Thank you. So let me just  
25 ask you, you said consolidate for liability discovery.

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1 You're not moving to consolidate the cases, just for  
2 discovery.

3 MR. SHAPIRO: No, your Honor.

4 THE COURT: Okay. So why don't I start with  
5 Mr. Lax? Do you have a view on --

6 MR. LAX: Certainly, your Honor. So, you know,  
7 what we were -- what all of us walked away from our last  
8 conferral with the plaintiffs' committee was that they  
9 were seeking to actually do liability discovery first,  
10 then damages. So I just want to be clear, they're now  
11 saying that we can do it all at the same time, they just  
12 make clear like who can see what types of damages  
13 discovery that -- because I just want to be clear that  
14 that's what the current position is because they were  
15 saying to bifurcate and we'll do liability first, then  
16 damages.

17 THE COURT: Right. Well, what --

18 MR. JACOBSON: Now I am understanding it to be  
19 -- it's simultaneous, it's just the difference is they  
20 don't want me privy to things perhaps about Stephanie  
21 Rosenfeld because I -- she works at my agency and there  
22 may be some personal information they produced to Mr.  
23 Jacobson and Mr. Kimmel and then Lemieux, they would not  
24 -- Mr. Kimmel and Mr. Jacobson wouldn't be privy to his  
25 damages discovery.

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1                   THE COURT: What I heard was that they want the  
2 discovery to be separate but parallel.

3                   MR. JACOBSON: Okay.

4                   THE COURT: Simultaneous; let's put it that  
5 way.

6                   MR. JACOBSON: I think from my perspective, it  
7 should all move forward. Liability discovery is not so  
8 significant. The damages discovery could actually be a  
9 lot more significant. So it needs to start now, however  
10 that shapes out.

11                  And if there's a discussion about me being  
12 walled out from let's say treatment records from a  
13 psychiatrist for Stephanie Rosenfeld, if that's what  
14 exists, I am happy to be reasonable on that topic but we  
15 just don't want it sequential. We want it all happening  
16 at the same time.

17                  THE COURT: So, Mr. Shapiro, do you have any  
18 problem with that?

19                  MR. SHAPIRO: No, we don't have a problem with  
20 that, your Honor. It's true -- I understand Mr. Lax's  
21 confusion. We floated that, the concept of doing it  
22 sequentially when we spoke earlier. They raised some  
23 concerns about that that we heard. We thought about it.  
24 I think we're fine doing it on parallel tracks.

25                  I think the most -- I think the documents

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1 should be relatively easy to segregate. I think damages  
2 documents will be different from liability documents. I  
3 think where it might be a little trickier is depositions.  
4 Something that we talked about on our side of the table  
5 is potentially just -- essentially doing depositions in  
6 two parts. So to the extent our client has any  
7 information on liability, we would hold a deposition.  
8 Everyone could be there, ask the questions they want.

9                   And then a separate session on damages  
10 discovery only where only Mr. Jacobson and his firm would  
11 be there to ask the questions.

12                   THE COURT: All right. Well, that sounds like  
13 a good way to proceed.

14                   MR. LAX: Your Honor, I would want to just  
15 think about that proposal because the issue for us is  
16 that although Lemieux and Stephanie Rosenfeld have  
17 separate actions, they are witnesses in each other's  
18 cases. And so to the extent that there may be some  
19 credibility issue that develops from testimony, that type  
20 of walling off may not -- may deprive us of something we  
21 would otherwise be entitled to but that's something I can  
22 confer with the plaintiff's counsel about and, you  
23 know --

24                   THE COURT: Right. I think that the concept of  
25 having depositions in -- walled off depositions, let's

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1 say, makes sense. It's just where the walls will be  
2 built. And so I think you can work out those details.  
3 If you think it's appropriate for you to be present at  
4 any part of the deposition, you can certainly have a  
5 discussion about that.

6 MR. LAX: Okay.

7 THE COURT: Okay?

8 MR. LAX: All right.

9 THE COURT: But the concept of having  
10 depositions in that way, I think makes sense. You just  
11 have to work out the details. All right.

12 And so for Mr. Jacobson and Mr. Kimmel, did you  
13 want to add anything as far as the progress of discovery?

14 MR. JACOBSON: No, we just weren't quite clear  
15 about the delineation between the damages and the  
16 liability discovery. Obviously, with the claims that are  
17 being made, for instance, receipt of authorizations  
18 immediately for us to start gathering records, which  
19 typically takes some time on the medical side, we need  
20 those authorizations. It's provided for, I believe, in  
21 the proposed discovery plan and once we receive them,  
22 we'll start to gather the records and proceed.

23 THE COURT: Okay, great.

24 MR. JACOBSON: Thank you.

25 THE COURT: And then the other part of it is as

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1 to the class discovery. So Mr. Shapiro, you've proposed  
2 that there be class discovery proceeding immediately as  
3 well.

4 MR. SHAPIRO: Correct, your Honor.

5 THE COURT: Okay. So let me find out from the  
6 defendant what your views are.

7 MR. JACOBSON: Are view, or I should say the  
8 City defendants view, Mr. -- we've actually been ignoring  
9 you, I believe.

10 THE COURT: Oh, sorry. You're sitting together  
11 and so I didn't give you a chance in to weigh in on  
12 discovery.

13 MR. SORKOWITZ: Don't worry, your Honor. I  
14 don't have a problem standing up and saying something if  
15 need be.

16 THE COURT: Okay, good. Thank you.

17 MR. LAX: I apologize to you, Mr. Sorkowitz.

18 From the City defendants' perspective, I mean  
19 the only real -- class discovery, this is not -- it's  
20 sort of an unusual class action because it's really just  
21 a series of individual claims, really the "class"  
22 discovery is going to follow from the same discovery, at  
23 least for me from the Lemieux case in terms of liability  
24 and then the damages are being alleged, is that people  
25 were incidentally, unlawfully intercepted.

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1                   And so I expect at some point this morning,  
2 we're going to talk about the electronic information that  
3 was intercepted by Lenich and how that is going to be  
4 handled going forward. That is really the bulk of what  
5 the discovery is because in identifying who was a  
6 legitimate class member, and who may not be a legitimate  
7 class member, that information, I think is really the big  
8 bulk of what it is that's going to -- so everything, I  
9 think overlaps with the Lemieux case, at least from my  
10 perspective.

11                   THE COURT: All right.

12                   Mr. Sorkowitz?

13                   MR. SORKOWITZ: Yes. Your Honor, the --  
14 proceeding with class discovery is just fine. In our  
15 view, the major issue is going to be the varying  
16 expectations of privacy among the counter parties to  
17 these calls and, you know, that will be the focus of the  
18 discovery that we want to take here.

19                   You know, I think there's been some back and  
20 forth on whether various things fall into a liability or  
21 a damages bucket in the individual cases. With respect  
22 to the class case, I think they travel together for that  
23 reason.

24                   The individuals who were on the other end of  
25 these calls, you know, may have been in a public place,

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1 may have been a commercial call, et cetera, et cetera.  
2 I'm sure you're familiar with these issues.

3 So, that will be the focus of the discovery  
4 that we expect to take and it will be necessary to  
5 proceed with that.

6 THE COURT: Okay. And Mr. Jacobson, Mr.  
7 Kimmel?

8 MR. JACOBSON: We agree with that, your Honor.

9 THE COURT: You agree. Okay. Great. So I  
10 just wanted to make sure that everybody was on the same  
11 page with what I've identified as different buckets  
12 potentially of discovery. So it sounds like everything  
13 can go forward; liability, damages, and class discovery  
14 and then you'll work out the details as to who needs to  
15 be walled off from what part of it, okay? So that's  
16 great.

17 Let's now turn to the discovery plans that have  
18 been proposed. And I see a footnote here --

19 MR. JACOBSON: Yes, your Honor, that --

20 THE COURT: -- where the City defendants object  
21 to discovery proceeding.

22 MR. JACOBSON: I failed -- I looked for it but  
23 then I didn't see it and I failed to omit it from this  
24 round. So I apologize.

25 THE COURT: Okay. So you don't object.

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1                   MR. JACOBSON: Yeah, we're --

2                   THE COURT: That's great. Okay. So I will  
3 cross that out. And let me start with the oldest case,  
4 so that I can -- and it looked from my review as if the  
5 dates are all the same.

6                   So you've had your 26(f) conference and you've  
7 -- well, in the latter cases, the initial disclosures  
8 have been exchanged but in the first filed case, the  
9 Stephanie Rosenfeld case, it says your 26(a)(1)  
10 disclosures won't be exchanged until April 3rd. Why is  
11 that different?

12                  MR. SHAPIRO: We have -- plaintiff has given  
13 initial disclosures already in that case. I believe the  
14 request was from the defendant because they are  
15 relatively new to the case, and so we consented to that.

16                  THE COURT: Okay. But I guess I am not sure,  
17 Mr. Lax or Mr. Jacobson, you could tell me why that date  
18 is different from the ones in the latter two cases.

19                  MR. LAX: Yes, your Honor. You may remember  
20 that we did things sort of out of sync in the one that I  
21 was one, counsel of record in the Stephanie Rosenfeld  
22 case. So there was discovery produced in the Stephanie  
23 Rosenfeld case but we never actually had a discovery  
24 schedule and so there was actually no formal initial  
25 disclosure served in that case.

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1                   And then when we were here for Lemieux's case  
2 in the class action, your Honor directed everyone to  
3 serve in those cases, I think by the 28th, initial  
4 disclosures. So that's why it happened in those two  
5 cases but the gentlemen in the Stephanie Rosenfeld case  
6 were not present and they were not subject to that order  
7 and so that's why it's sort of all over the place.

8                   THE COURT: Okay. But it's basically going to  
9 be the same discovery.

10                  MR. JACOBSON: Yes, your Honor, I would believe  
11 so.

12                  THE COURT: Okay. Good. So now I am glad  
13 everybody is here and we can all be on the same page and  
14 get caught up.

15                  So let's move onto the medical authorizations.

16                  MR. SHAPIRO: Your Honor, I -- so our position  
17 on that is that we understand that at least in the  
18 Stephanie Rosenfeld case, speaking about that exclusively  
19 now, psychological records are relevant. We intend to  
20 seek emotional damages here.

21                  We would object to providing authorizations for  
22 a blanket release of her psych. records. We will -- what  
23 we would propose is that -- well, I don't have the psych  
24 records now myself, but that we retrieve them and we take  
25 a look at them and produce all the relevant material.

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1                   THE COURT: Well, that -- okay. I will hear  
2 from defendants first before I interject.

3                   MR. JACOBSON: Your Honor, I've been doing this  
4 sort of practice with physical and psychological injuries  
5 for most of my career. Typically, in my experience, what  
6 happens is we are given HIPAA authorizations. If someone  
7 is making a claim, putting their psychological or  
8 physical condition into question, we're entitled to  
9 obtain all the records. They don't get to filter what  
10 they want us to see and what they don't want us to see.

11                  And in addition, if the claim is that someone  
12 is now undergoing psychiatric or mental health treatment  
13 as a result of some sort of an event or an injury, but  
14 they were seeking that treatment before and this is just  
15 further treatment and possibly an exacerbation of a pre-  
16 existing condition, we should be entitled to see all the  
17 records without any question.

18                  So our position is, we're entitled to HIPAA  
19 authorizations. We're entitled to know what healthcare  
20 or mental healthcare treatment she has sought for this  
21 and in the past, and that we be able to obtain the  
22 records, review them and use them accordingly.

23                  And just as an aside, obviously if there are  
24 going to be settlement discussions at some point, we need  
25 to know what the claim is for her psychological injuries

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1 because that's going to be an element of the damages that  
2 they're seeking, how could I possibly write a report to  
3 my principals without giving them a breakdown and an  
4 analysis of what the injuries are?

5 THE COURT: Okay.

6 MR. SHAPIRO: Just to be clear, we're not  
7 suggesting that they're not entitled to psychological  
8 records. That's not the question. What he's asking for  
9 now it sounds like is for every record of every  
10 psychological visit she's ever had for all time. That's  
11 a --

12 THE COURT: Well, I don't know that it's a time  
13 issue. I think there might be some time limit you can  
14 put around it but in terms of whatever falls within that  
15 time, you shouldn't get to pick and choose what is  
16 related to this case and what is not related to this case  
17 because the mind and body is all interconnected, right?  
18 So if --

19 MR. SHAPIRO: Well, I do think that if --

20 THE COURT: If she started seeing a  
21 psychiatrist the day after this came to light and she is  
22 suffering, then everything should come in or should be  
23 produced at that point.

24 MR. SHAPIRO: And I don't know, to the extent  
25 she was -- if she was seeing a psychiatrist before this

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1 event, I don't know, we will find that out but I would  
2 certainly request if we're going to be ordered to provide  
3 HIPAAs that there be a time frame on this, that it not be  
4 allowed to go back forever.

5 THE COURT: All right. Yes. I mean, you  
6 should talk about a time frame but you shouldn't get to  
7 pick and choose, which is what you said when you stood up  
8 earlier, right? So please work out a time frame for how  
9 many --

10 MR. JACOBSON: Yes, your Honor.

11 THE COURT: -- what time period you're seeking  
12 the authorizations and get that done. It says here on  
13 the Lemieux and class cases, that it's not applicable.  
14 So in the -- you're only seeking -- you're only claiming  
15 psychological, medical nongarden-variety injuries for  
16 Stephanie Rosenfeld, right? Everybody else is just  
17 garden variety.

18 MR. SHAPIRO: Certainly not the class, we're  
19 not -- the class we are not seeking.

20 THE COURT: How about Lemieux and --

21 MR. DOOLEY: Yeah, similar emotional distress  
22 damages in Lemieux. There's no damages claim and -- for  
23 the class, except for the statutory damages.

24 THE COURT: So it's garden variety.

25 MR. DOOLEY: The only thing that -- garden

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1 variety. Excuse me.

2 THE COURT: Okay.

3 MR. DOOLEY: And, your Honor, the only thing I  
4 would note with what Mr. Shapiro was saying earlier is  
5 not so much that the plaintiffs are interested in picking  
6 and choosing but simply in seeing it first and that may  
7 not be as unreasonable an --

8 THE COURT: Well, you can always see it because  
9 it's your own clients, so just get the authorization from  
10 your clients to see the records and then the defendants  
11 will have an opportunity to get the same records from the  
12 same providers.

13 MR. DOOLEY: Yes, your Honor.

14 THE COURT: They shouldn't have to pass through  
15 your hands to get to them, in other words. So you're  
16 always free to get your own client's records.

17 MR. DOOLEY: I recognize that.

18 THE COURT: Yes.

19 MR. DOOLEY: In some instances, there may be an  
20 interest in seeing them first, so that the client can  
21 make a determination as to how to proceed without  
22 withholding anything from the other side.

23 THE COURT: I appreciate that your client may  
24 have an interest in it, but that doesn't mean they're  
25 entitled to it.

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1 MR. DOOLEY: Just wanted to raise the issue.

2 THE COURT: Okay. Thank you.

3 So let's look at the 160.50 arrest records,  
4 releases; that has been done for everyone. Okay? There  
5 are no John Doe --

6 MR. SHAPIRO: Your Honor, sorry. On the  
7 160.50, so I think -- and we spoke about this a little  
8 earlier. You had previously ordered -- granted an order,  
9 I believe this is how it was done, and Josh, correct me  
10 if I am wrong, but the Court had granted an order  
11 allowing the unsealing of the Kings County District  
12 Attorney's files with respect to Tara Lenich. That was  
13 done in the context of the Stephanie Rosenfeld case.

14 What we had discussed earlier this week was  
15 that the order just be expanded, so that it include the  
16 other two cases. I think that still, as a housekeeping  
17 matter, would need to occur.

18 THE COURT: So what does the Court need to do?

19 MR. SHAPIRO: Expand the unsealing order that  
20 the Court entered in Stephanie Rosenfeld --

21 THE COURT: Oh.

22 MR. SHAPIRO: -- and allow those unsealed  
23 records to be used in the class case and the Lemieux  
24 case.

25 THE COURT: Okay. So Mr. Sorkowitz, since it's

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1 your client's records, do you need me to sign something  
2 in particular to unseal the records for all three cases?

3 MR. SORKOWITZ: I know that previously we had  
4 filed a paper authorizing the release of those records, I  
5 believe to the City in the Stephanie Rosenfeld case.

6 Josh, you're indicating that's not correct  
7 or --

8 MR. LAX: There was -- it was very simple. All  
9 that happened was that I believe there was a motion, a  
10 consent motion made. I think there might have even been  
11 a proposed order submitted and there was an affidavit  
12 from Lenich because there was some issue with where she  
13 was in prison and getting her to notarize the actual  
14 release, so it was like a (indiscernible).

15 To cut all this out -- I mean, to cut through  
16 it, either we can all just consent to the order that was  
17 entered in the Stephanie Rosenfeld case being expanded to  
18 apply to everything.

19 The other thing is that I learned today, Ms.  
20 Lenich has actually been released from prison already.  
21 So the easiest thing to do is just to have her sign a  
22 release and give it to all the parties. That might be  
23 the other thing -- way to handle it, which I was not  
24 aware of until this morning. So --

25 THE COURT: Okay. So Mr. Sorkowitz, what's the

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1 best way to proceed for your client?

2 MR. SORKOWITZ: It shouldn't be an issue, your  
3 Honor, to get those executed. I mean, I will confer with  
4 my client and with counsel but I don't anticipate this  
5 being a hangup.

6 THE COURT: Okay. Great. And let me just get  
7 clarification, is it pronounced [Len-ick] or [Len-itch]?

8 MR. SORKOWITZ: [Len-itch].

9 THE COURT: [Len-itch], okay. So the arrest  
10 records and that's the only one at issue, is for Ms.  
11 Lenich's arrest record, okay?

12 MR. SORKOWITZ: I believe so.

13 MR. SHAPIRO: At the moment. Yeah, I believe  
14 so, your Honor.

15 THE COURT: Okay. We have the identification  
16 of John and Jane Doe defendants in the Stephanie  
17 Rosenfeld case, having a date of June 10th. Are there  
18 John Doe defendants here?

19 MR. SORKOWITZ: There are in the Rosenfeld  
20 case. I'm not sure whether we will actually be  
21 identifying anyone but we just wanted to build in a  
22 little time and see the initial discovery and then make a  
23 determination, your Honor.

24 THE COURT: And there is a proposed stipulation  
25 of confidentiality. Is that something that, I guess the

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1 parties are still reviewing and if you agree to it, and  
2 you want the Court to so order it, please file it on the  
3 docket, okay?

4 MR. SORKOWITZ: Yes, your Honor.

5 THE COURT: And you have talked about ESI but  
6 it sounds like that's something we may need to talk about  
7 today. Mr. Shapiro?

8 MR. JACOBSON: Your Honor?

9 THE COURT: Oh, yes.

10 MR. JACOBSON: May I? I'm sorry.

11 THE COURT: Yes, go ahead.

12 MR. JACOBSON: Just with respect to the John  
13 Doe defendants, as a practical matter, that may present  
14 or throw a monkey wrench into this because we don't know  
15 who they believe they may be bringing in. There may be  
16 people that I might be defending. There may be other  
17 counsel that has to be brought in.

18 So maybe the time frame that we have here is a  
19 little bit too broad. If they seem to know who they are,  
20 and rather than do that and have to come back to you and  
21 say this -- none of this is good, maybe we should do the  
22 adjustments while we're here today.

23 THE COURT: All right. So do you have a sense,  
24 Mr. Shapiro, of who those --

25 MR. SHAPIRO: No, I don't believe I ever said

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1 that.

2 THE COURT: -- defendants may be?

3 MR. SHAPIRO: I said we needed to see discovery  
4 and the date for discovery was going to be -- discovery  
5 requests is April 10th, meaning we're not going to get  
6 responsive documents until the middle of May and that was  
7 the reasoning behind this time frame.

8 THE COURT: All right. So -- Mr. Emery, did  
9 you want to say something?

10 MR. EMERY: No, I just wanted to check -- I was  
11 wondering whether the claims against the individuals,  
12 John Does, were dismissed by Judge Garaufis and --

13 MR. SHAPIRO: I don't think they all were and  
14 there's also a question of -- I think our position would  
15 be we would like to see the discovery on this. There's -  
16 - the claims that were dismissed were claims against  
17 individual City defendants under the Wiretap Act.

18 MR. EMERY: That's true (indiscernible) --

19 MR. SHAPIRO: There are other individuals --

20 MR. EMERY: State claimants.

21 THE COURT: Hold on. I'm sorry. Mr. Emery, if  
22 you're not speaking, please don't speak, all right?

23 MR. SHAPIRO: There are other individual  
24 defendants who are still remaining in the case with state  
25 law claims against them. There could be John Does who

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1 also have state law claims against them. I don't know.  
2 To be perfectly honest, I don't totally anticipate it but  
3 I don't want to waive our right to identify these folks  
4 after receiving discovery.

5 THE COURT: All right. So it seems that that  
6 is a matter that should be resolved as quickly as  
7 possible. So if you -- once you get your discovery  
8 responses and you're in a position to identify those  
9 people, reach out to the defendants -- defense counsel  
10 immediately, so that they can determine whether they need  
11 to bring in new counsel or other things.

12 MR. SHAPIRO: Absolutely.

13 THE COURT: All right. So that we're not  
14 waiting necessarily until June to move forward because we  
15 may lose time, all right? So that's a good suggestion,  
16 Mr. Jacobson.

17 So for ESI, what do we need to talk about  
18 today, if anything?

19 MR. SHAPIRO: We had sent a proposed ESI  
20 procedure to the defendants. We haven't received  
21 comments yet on it, so I -- they have our proposal. I  
22 don't know exactly what their position is.

23 THE COURT: Okay. So do we need to discuss  
24 this or --

25 MR. LAX: No, your Honor, I -- this is Mr. Lax.

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1 So I think I do recall receiving it. I think it got lost  
2 in the shuffle a little bit because it was received in  
3 the Lemieux and class case, so I don't even know if  
4 they've seen it yet.

5 It's something we just need to go back to and  
6 confirm. I don't think there's any disagreements at the  
7 moment that are ripe for the Court.

8 THE COURT: Okay, good. So please do keep  
9 talking about it. It may get complicated and so I want  
10 to make sure that everyone is on top of that, okay?

11 So let's look at the settlement proposals. You  
12 are planning to make a settlement demand by May 31st.  
13 And then there will be a settlement offer by June 28th  
14 and you're thinking that you might be able to sit down  
15 and have a settlement conference by July 10th.

16 So let me ask the parties first, because I like  
17 to give everybody the opportunity to take advantage of  
18 our wonderful mediation program. We do have professional  
19 mediators on staff -- not on staff, sorry -- who are on a  
20 panel, who have volunteered to do a mediation session at  
21 a reduced rate, \$600 for the first session. There are  
22 several parties here, so dividing it should make it very  
23 cost effective. And if you want to continue with the  
24 mediator for subsequent sessions, you can and you can  
25 work out the rate or if things don't work out after that,

1 you can come to the Court and ask for a settlement  
2 conference.

3 Do you think it would be useful for you to try  
4 that first or do you think that you should be coming  
5 directly to me for a settlement conference. Mr. Shapiro,  
6 let me start with you.

7 MR. SHAPIRO: We're open to the idea of  
8 mediation, your Honor.

9 THE COURT: Okay. Yes, Mr. Sorkowitz?

10 MR. SORKOWITZ: Your Honor, if I may, one of  
11 the issues that we've put forward in our motion to strike  
12 the class allegations that's currently being brief is a  
13 conflict on the part of class counsel that, because of  
14 the class case's interaction with the individual cases,  
15 that may affect negotiations. We're okay to exchange  
16 offers on this schedule but as far as a mediation goes,  
17 we would like a resolution for that motion before  
18 proceeding to mediation.

19 THE COURT: Okay. So that's your motion to  
20 strike the class.

21 MR. JACOBSON: Correct, your Honor, and we  
22 haven't -- you know, earlier I didn't seek to stay class  
23 discovery in the interest of that because it seemed like  
24 your Honor wanted to do them together but as far as going  
25 into a mediation, the relationships between the parties

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1 and cases, we would like some kind of statement from the  
2 Court on that before proceeding to a mediation,  
3 respectfully.

4 THE COURT: Okay. Because you think that if we  
5 don't know if there's going to be a class, it's hard to  
6 settle.

7 MR. JACOBSON: Well --

8 THE COURT: You might be settling just  
9 individually if there's no class left.

10 MR. JACOBSON: Actually, your Honor, the issue  
11 is Daniel Rosenfeld and Vincent Garcia -- that's  
12 certainly a part of it but the named plaintiffs and their  
13 counsel are either relatives or also representing the  
14 plaintiffs in the individual actions.

15 THE COURT: I see.

16 MR. JACOBSON: So how do you balance those two  
17 settlements? It's not clear. That's why we think  
18 there's a conflict. That will be briefed and decided,  
19 which is fine but as far as a mediation sessions, we're  
20 open to the idea but timing-wise, don't think it should  
21 take place until there's a resolution on that.

22 THE COURT: Okay. I hear you.

23 Mr. Lax, do you have a position?

24 MR. LAX: I don't have authority to agree to  
25 the mediation program, because it involves money that

1 would have to come from the comptroller. I know I would  
2 be happy to come before your Honor and discuss these  
3 issues. You've already learned a lot, I think, in the  
4 course of the three cases. So we're happy to come here.

5 I would have to find out what our interest in  
6 mediation would be and report back at another time.

7 THE COURT: Okay. Great.

8 MR. SORKOWITZ: And obviously, the dog wagging  
9 the -- the tail wagging the dog on this issue, we'll have  
10 to speak with the City as well and get authority for  
11 that.

12 THE COURT: Okay. Right.

13 MR. SORKOWITZ: Thank you.

14 THE COURT: But I think the timing issue is  
15 still one that's a little bit open. So I guess from the  
16 plaintiffs' perspective, you would be seeking in addition  
17 to the individuals, also a class settlement, right?

18 MR. SHAPIRO: Yes, your Honor. Yes.

19 THE COURT: Because I've seen cases where  
20 there's a settlement with the individuals and they say  
21 forget the class, we'll just settle on the individuals  
22 but if you're sitting down for settlement discussion, you  
23 would be seeking to have a class settlement, as well as  
24 the individuals.

25 MR. SHAPIRO: Yes, we're certainly willing to

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1 mediate and discuss settlement on behalf of the class and  
2 on behalf Jarrett Lemieux and/or Stephanie Rosenfeld and  
3 Jarrett Lemieux.

4 THE COURT: But my question was more would you  
5 be willing to sit down and talk just settling the  
6 individuals not the class or it's all bound up together?

7 MR. SHAPIRO: Oh, yes. I think we would be  
8 willing to do that, your Honor.

9 THE COURT: All right. So that will effect  
10 whether it makes sense to go forward with a settlement  
11 conference early on. So what I would propose is that I  
12 keep that date open. Just looking at the dates also, I  
13 think it's probably too soon after the settlement offer  
14 has been made because it's only about two weeks after  
15 that. So it may be too soon. Everybody needs time to  
16 really look at the settlement demand and offer.

17 So I will not schedule a settlement conference  
18 for July 10th but I will ask the parties to get back to  
19 me with a joint proposal, either agreeing to mediation or  
20 not and then proposing a new date for when everybody can  
21 sit down and talk.

22 I know, Mr. Sorkowitz, you've made your desire  
23 to sit down and have a settlement discussion contingent  
24 on a decision in the class -- your motion to strike the  
25 class but please see if it makes sense to try to talk in

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1 advance.

2 MR. SORKOWITZ: I'm happy to talk to my client  
3 about it, your Honor. And, you know, when a decision  
4 will come down on that is unpredictable, so --

5 THE COURT: Yes.

6 MR. SORKOWITZ: -- you know, I would love to be  
7 able to make a more definitive statement but --

8 THE COURT: I understand. So but it may be  
9 that there's a moment early in the litigation before all  
10 the legal issues have been sorted out, when people in the  
11 -- in an atmosphere of uncertainty where there might be  
12 very good reasons to settle, all right? And if the  
13 plaintiffs are also willing to talk individually, then  
14 the issue of the class may become less of a concern for  
15 you.

16 So we just need to figure out what people are  
17 willing to sit down and talk about and then what the  
18 timing of that should be. I think July 10th is probably  
19 too soon, given the offer and demand; later in July maybe  
20 fine. I mean, I am not saying you have to wait until the  
21 fall, sometime in the summer may be fine but I would  
22 think that you need a little bit more than two weeks to  
23 think about an offer before sitting down and having a  
24 long discussion, okay?

25 So let's see if the parties can send me that

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1 proposal in about two weeks? I'm just loading up my  
2 calendar. April 10th. So, April 10th the parties should  
3 let me know about mediation and settlement conference.

4 All right, let's keep moving. The motion to  
5 join new parties, it says here within 30 days of the  
6 Court's deposition -- disposition of the Rule 12 motions,  
7 subject to the applicable statute of limitations, okay.

8 And you're doing your initial request and  
9 interrogatories April 10th, fact discovery to be  
10 concluded by December 20th.

11 Now I see here you're thinking that there may  
12 be expert discovery on the issue of policies and  
13 practices regarding wiretapping. And for the Stephanie  
14 Rosenfeld case, also a psychiatrist and economist.

15 What is the economist's role?

16 MR. JACOBSON: Your Honor, I just had that put  
17 in as a matter of protection for us. There are certain  
18 claims that are made that she was unable to work. They  
19 may have a claim that she has wage loss. I mean, I don't  
20 know exactly where they're going to be going with that  
21 but out of an abundance of caution, I just put in that we  
22 may need an economist.

23 THE COURT: Okay. Thank you.

24 MR. SORKOWITZ: Your Honor, if I may, this is  
25 frankly off the top of my head, hearing what Mr. Jacobson

1 had to say but it does occur to me that I believe Jarrett  
2 Lemieux is also making allegations that he's had adverse  
3 consequences at work. It's not clear to me exactly what  
4 dollar figure he is going to assert for that.

5 So I can't say right now what kind of expert  
6 we're going to have on it but it just makes sense to put  
7 on the record that it may also be necessary in that case.

8 THE COURT: Okay. So but regardless of that,  
9 you'll adhere to the same schedule, which is that there  
10 will be a case-in-chief expert report due January 31st,  
11 rebuttal expert due February 28th, deposition of experts  
12 to be completed by April 3rd, in 2020. And you'll  
13 certify everything is done by April 6th and if there's  
14 going to be a summary judgment motion, you need to make  
15 your pre-motion conference request to Judge Garaufis by  
16 April 17th. And if there's no motion, then you'll be  
17 ready for your joint pre-trial order by May 15th.

18 All right, great. So I see that for -- this  
19 must be an error because you have a class action motion  
20 in both the Lemieux and the class case. The Lemieux case  
21 is not a class action. So there shouldn't be dates for  
22 the Rule 23 class certification. I will cross that out.  
23 Right?

24 But in the class action case, within 30 days --  
25 within 90 days of the disposition of the Rule 12 motions.

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1 All right. So I guess we'll see once the decision comes  
2 out and then you'll just jump on that schedule.

3 So I think this looks good and I'll enter these  
4 orders in all three cases. They're running  
5 simultaneously and coordinated, so I appreciate that.

6 So action items; if the parties have their  
7 confidentiality stipulation, please submit it for my  
8 ordering. Please work out your ESI issues and if you  
9 need anything from the Court in terms of so ordering,  
10 please submit that as well.

11 By April 10th, you'll submit a letter letting  
12 me know about mediation and a new settlement conference  
13 date. And talk to each other about what that settlement  
14 conference is likely to encompass.

15 Once I schedule a settlement conference, I will  
16 also require settlement statements to be submitted, about  
17 ten days in advance, so that I can get a preview of what  
18 the settlement conference is likely to entail and then I  
19 will call each of you ex parte to discuss your settlement  
20 statements, so that I have an idea of where we can go.  
21 And it's also very useful because sometimes they're  
22 missing pieces and that gives people an opportunity to  
23 fix them before the conference itself.

24 Beyond that, I think the parties will just be  
25 going forward on discovery and I won't require another

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1 conference unless the parties request it. I may ask for  
2 a status report on the progress of discovery but I will  
3 do that after I hear from you in terms of any settlement,  
4 okay?

5 Is there anything else from the plaintiffs?

6 MR. SHAPIRO: Nothing from us, your Honor.

7 THE COURT: All right. Great. And for the  
8 defendants?

9 MR. LAX: Yeah, there's two issues, your Honor.  
10 So firstly, your Honor may remember back in the summer or  
11 fall time, there was a discussion about the unsealing or  
12 the disclosure from the sealed files of the DA's Office  
13 of the actual interceptions themselves. That's the voice  
14 recordings from the phone calls and the text messages  
15 from the -- I guess there were two different plants.

16 From my perspective, and the cases I'm  
17 representing, I believe that we're at the point where  
18 that information, those materials, are going to have to  
19 be unsealed and the parties are going to have to have  
20 access to them for a couple of different reasons.

21 One is, they're relevant to damages. Two is  
22 that the metadata so far only includes phone numbers.  
23 That doesn't give us much in the way of what the  
24 interceptions entail and that's important for the class  
25 action discovery.

1           There may be other things in there that pertain  
2 to issues that we don't even know about but it would seem  
3 to me that this case can't proceed properly unless the  
4 parties have access, subject to whatever protective  
5 orders, to the recordings and text messages and things of  
6 that nature, themselves.

7           Connected to that, there's no dispute that we  
8 need to unseal the metadata that was not already unsealed  
9 in the Stephanie Rosenfeld case and that any metadata  
10 that was in the Stephanie Rosenfeld case, also needs to  
11 be incorporated into the other two cases because that's  
12 evidence of the interceptions themselves.

13           And I think that part of it we'll deal with  
14 under whatever protective order we file with the Court in  
15 the two new matters. But the parties have begun talking  
16 about this issue. It's clear at this stage, that I don't  
17 think we have a meeting of the minds on what the  
18 appropriate scope is. I mean, it's basically we're  
19 saying everything and they're saying nothing. And so  
20 that is already a live issue that's coming up in the  
21 case.

22           The other --

23           THE CLERK: Sir, do not touch the mic.

24           MR. LAX: Oh, sorry.

25           THE CLERK: Yeah.

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1                   MR. LAX: I'm used to gesticulating and I  
2 apologize.

3                   THE COURT: You could gesticulate all you want,  
4 just don't brush against the microphone.

5                   MR. LAX: Excuse me, your Honor.

6                   So that is something that is something that --  
7 I mean, one part of it is the confidentiality order which  
8 I think the procedures under the confidentiality order,  
9 everyone will agree to. It's just what is the ultimate -  
10 - what will the parties have access to in doing discovery  
11 in this case.

12                  And I think at least from my perspective, we  
13 can't properly prepare for a settlement conference or a  
14 response to a demand without that information and I  
15 frankly don't think the plaintiffs' side would be doing  
16 their client a service if they don't actually have a  
17 listen or take a read for their folks in making a demand  
18 because that -- the value is going to depend a lot, I  
19 think on what was the level of intrusion, what are the  
20 sorts of things that they internally may have  
21 experienced, knowing that it could have been intercepted,  
22 and things of that nature.

23                  THE COURT: All right. So let me just try to  
24 understand as far as the metadata.

25                  MR. LAX: Yes.

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1                   THE COURT: To the extent that there was  
2 metadata shared, produced, unsealed, and produced in the  
3 Stephanie Rosenfeld case, has that been shared as far as  
4 the other two cases?

5                   MR. LAX: Actually, both Mr. Shapiro and I have  
6 been keeping them under lock and key because we didn't  
7 think we were able to actually disseminate it, so while I  
8 gave all the files to Mr. Jacobson, and Mr. Kimmel's  
9 office, that is still sitting in a safe place contained  
10 because I didn't think I was able to under the order from  
11 Stephanie Rosenfeld and I don't think the Emery  
12 contingent has shared with the Wiggin & Dana contingent,  
13 the metadata from the first case.

14                  THE COURT: All right. Is there any reason it  
15 can't be or shouldn't be shared?

16                  MR. LAX: I don't believe so, your Honor.

17                  THE COURT: All right. So then share the  
18 metadata.

19                  MR. LAX: Okay.

20                  THE COURT: All right. Now the content creates  
21 -- presents a different issue and this has been the  
22 difficulty in this case, which is that the allegation is  
23 that there were certain damages from the mere  
24 interception and it's not clear whether -- to what extent  
25 specific communications have, in fact, been listened to,

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1 shared, disseminated. And there have been issues raised  
2 as to the further damage that could be done by having  
3 this content disseminated, even among the lawyers, let's  
4 say and their clients.

5 So let me hear from you, Mr. Shapiro, in terms  
6 of what you think should be done in terms of the content.  
7 I am not going to do a one-sided discovery and so, what's  
8 -- if one side wants it, the other side will get it. And  
9 so either it's all or nothing, okay? Either nobody looks  
10 at it and you move forward in a complete, black box, as  
11 far as what the content is or what the specifics of the  
12 content are or both sides share everything, okay?

13 MR. SHAPIRO: Understood, your Honor. I am not  
14 going to repeat my one-sided argument. Our position is  
15 that this content should not be disclosed at all. I  
16 haven't heard from the other side, a reason why it's  
17 really relevant. I don't understand the point on  
18 damages. My client doesn't know what was intercepted.  
19 She has no idea. I mean, she can -- to the extent she  
20 can recall maybe conversations she had, they're certainly  
21 entitled to ask her about that at her deposition but she  
22 doesn't have any advantage over them.

23 The damage was from learning the interception,  
24 the concern and as we have stated before, there's  
25 continuing damage from her not knowing what is happening

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1 but without a one-sided disclosure and I know that ship  
2 has sailed, there is no basis, we feel, to disclose to  
3 everyone in this case.

4 THE COURT: Okay. So the damages that or the  
5 distress that you're claiming is from the knowledge that  
6 there was interception. It may be that she's worried  
7 about very sensitive information being intercepted and it  
8 may also be that, I guess it, once you look at the  
9 content, it could be that, oh, there was nothing to worry  
10 about, that it wasn't very sensitive information  
11 disseminated but it doesn't really matter because she  
12 suffered from not knowing.

13 MR. SHAPIRO: That's correct, your Honor, and I  
14 think the crux of it, not all of it but a big part of the  
15 damage for her is the notion that someone was listening  
16 to her conversation and that feeling, that paranoid  
17 feeling that persisted even when she discovered this and  
18 persisted for a long time following that, that has  
19 nothing to do with the content, it has to do with the  
20 fact that they were being intercepted.

21 THE COURT: Okay. Got it.

22 MR. SORKOWITZ: Your Honor, if I may?

23 THE COURT: Yes.

24 MR. SORKOWITZ: From my client's perspective,  
25 one component of the claims or at least the allegations

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1 about her conduct is that she supposedly shared  
2 information that she learned from the tapes with others  
3 in the office. She contests that. She doesn't believe  
4 that's true. That's not to omit culpability for what she  
5 did do but she is adamant that she did not share  
6 information she learned solely on the tapes with others  
7 in the office.

8                   We should be able to test those allegations and  
9 we need the content of the communications in order to do  
10 that. If I am going to ask in a deposition well, did you  
11 hear -- you know, what was shared, I want to be able to  
12 compare that to the tapes to know if that's something  
13 that my client heard or didn't hear on the tapes to test,  
14 you know, that allegation.

15                   THE COURT: Well, Mr. Emery again --

16                   MR. EMERY: I'm sorry.

17                   THE COURT: -- I can hear even if you think I  
18 can't hear you, so please don't interrupt.

19                   Mr. Sorkowitz, so let me try to understand  
20 this.

21                   MR. SORKOWITZ: Uh-hum.

22                   THE COURT: You're saying that their maybe  
23 times when you want to question somebody on the content  
24 to test whether the source of that content was your  
25 client.

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1                   MR. SORKOWITZ: Well, what I want to question  
2 on is the rumors that or the scuttlebutt in the office  
3 that is supposedly sourced from the tapes and then be  
4 able to compare them to the tapes, to evaluate whether  
5 that's the real source of it.

6                   THE COURT: All right. So you want to compare  
7 the rumors with the tapes, so then you can say well, the  
8 tapes don't actually say that, so these rumors are just -  
9 -

10                  MR. SORKOWITZ: Potentially.

11                  THE COURT: -- rumors and it didn't emanate  
12 from your client.

13                  MR. SORKOWITZ: That's --

14                  THE COURT: Is that right?

15                  MR. SORKOWITZ: -- potentially what I would  
16 like to argue but I haven't heard the tapes, so I don't  
17 know if that's right or wrong, but --

18                  THE COURT: Right, but couldn't it --

19                  MR. SORKOWITZ: That's the idea here is that  
20 there's evidence that may bear on this question.

21                  THE COURT: Right, but couldn't it also be  
22 irrelevant to the sense -- in the sense that if they're  
23 rumors, your client could have -- the allegation just  
24 could be that your client made up the rumors without  
25 having them based in actually what she heard on the

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1 tapes.

2 MR. SORKOWITZ: Well, but the -- that wouldn't  
3 constitute a disclosure of information she heard on the  
4 tapes.

5 THE COURT: I see. Okay. And that also  
6 wouldn't tie into your client if the rumors were just  
7 made up by other people, right?

8 MR. SORKOWITZ: I would hope not.

9 THE COURT: Okay. All right. Mr. Jacobson?

10 MR. JACOBSON: Yes, your Honor. I think that  
11 plaintiffs' counsel here has given sort of a broad-  
12 brushed but limited perspective of their potential claim  
13 and I just looked very quickly at the sixth claim in  
14 which it indicates that the private communications were  
15 disclosed to members of the Kings County DA's Office and  
16 disclosed to other members of the Kings County DA's  
17 Office.

18 Well, with that claim, we should be entitled to  
19 see what those disclosures allegedly were. How can I  
20 possibly meet with my clients and speak with them about  
21 what's being alleged, they did or did not do in order to  
22 mount a defense of them, if I don't have the information.

23 I mean, we're in discovery and this discovery,  
24 I would believe, especially with materials as sensitive  
25 as this, will be subject to very strict protection by way

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1 of an order and its dissemination will have sanctions, I  
2 would -- that's inappropriate.

3                   But the idea that we can't take the steps  
4 necessary to look at the materials that are the  
5 underpinning of all of these claims against my clients,  
6 and have to proceed with discovery and possibly  
7 settlement negotiations and/or a trial without knowing  
8 what's in these things, I understand one element of the  
9 case has to do with statutory breaches and statutory  
10 damages but there are other allegations here that don't  
11 go to that and go to negligence and go to tortious  
12 interference and things of that nature and I should be  
13 entitled to discovery of what's in that material, what  
14 the content of the text messages are, and on top of it,  
15 they may dovetail with materials that we gather from the  
16 psychiatrist, as a perfect example.

17                   So, you know, again this is discovery. We  
18 should be entitled to it, subject to strict protective  
19 order and be allowed to do what we need to do to mount a  
20 defense in the case.

21                   THE COURT: Okay. Yes, Mr. Shapiro?

22                   MR. SHAPIRO: I'm not quite sure I  
23 understanding the testing disclosure argument. I don't -  
24 - I certainly don't understand why the contents are  
25 critical to taking discovery about whether any

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1 disclosures occurred.

2           Certainly at depositions, everyone is entitled  
3 to ask whether Lenich disclosed, what did Lenich tell  
4 you. Maybe the answer is nothing, maybe it's something.  
5 Those are certainly questions that you can ask. I don't  
6 understand exactly what you would be testing based on the  
7 contents.

8           In addition, with respect to Mr. Jacobson, as  
9 he surely knows, Judge Garaufis dismissed the claims  
10 about disclosures in the Stephanie Rosenfeld case. So I  
11 don't quite know -- to the extent there are not claims  
12 anymore under the Wiretap Act against individuals in that  
13 case. I don't know whether those claims will survive in  
14 the other cases either.

15           But in any event, I just don't see the argument  
16 that it is necessary, it is critical to under -- to see  
17 the content in order to test whether there has been  
18 disclosures. Those questions can be asked at deposition.  
19 These are very sensitive materials that should not have  
20 been intercepted in the first place and there's really,  
21 without a really critical basis to allowing them to be  
22 disclosed further, I don't think that that's in the --  
23 it's certainly something our client strongly objects to  
24 here.

25           THE COURT: All right. Well, I mean, I think

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1 the thing that seems just thinking it through, and I  
2 maybe asking for further briefing on this issue, the  
3 testing it seems to me, I am a little surprised, I guess  
4 at the positions of the parties because it seems based on  
5 your -- on the plaintiffs' claims, the plaintiffs are the  
6 ones who would want the content because if they were to  
7 say well, there's this rumor of X floating around and the  
8 only way anybody could have come up with that is because  
9 they had access to the information in the wiretaps, then  
10 that would create a clear link to whoever heard it,  
11 created the rumor.

12           But that's not what you want and yet, the  
13 defendants are the ones who are asking for it, seeming to  
14 disprove that point, but I don't know how you would  
15 disprove it by knowing the content. So, you know, I  
16 would like to give the parties an opportunity to kind of  
17 think through their positions, and give me some further  
18 briefing with some more details as to the specific  
19 arguments that you're -- the specific points you're  
20 trying to prove or disprove and the arguments as to why  
21 the content would be necessary for that, okay?

22           Yes?

23           MR. JACOBSON: Your Honor, just to clarify  
24 something, all of those claims were not dismissed by the  
25 judge's order and decision. In fact, while they were

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1 dismissed as to the individual defendants, the City --  
2 the judge specifically found that there City could be  
3 held liable under respondeat superior. So I just wanted  
4 the record to be clear about that.

5 THE COURT: Yes.

6 MR. JACOBSON: That is still out there and I  
7 have to defend that particular claim.

8 THE COURT: Yes, I am aware of that.

9 MR. SORKOWITZ: And that claim, just to be  
10 clear also, is about Lenich's interceptions and that's  
11 what they would be liable for.

12 THE COURT: Right, so Judge Garaufis was very  
13 clear and so, you know, whatever he said is what controls  
14 in this case, and so we'll go back to that. But I am  
15 still curious about this particular issue about the  
16 content because I think the parties really do need to sit  
17 down and think through what they need to prove their  
18 cases and what might not be necessary and whether, for  
19 example, the plaintiffs are really willing to go forward  
20 with a black box in this case. Okay?

21 Because if everything is sealed, it's a black  
22 box. You're not going to be able to talk about it and  
23 speculate because nobody had a chance to look at it and  
24 so if that's your claim -- if that's your position, then  
25 you need to look at whether your claims and your damages

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1 are -- whether you can do what you're trying to do, okay?  
2 And the same thing for the City or the flip side of it  
3 is, do you really need this to disprove if the plaintiff  
4 doesn't have it, do you need it to disprove something  
5 because if they can't prove something, you don't need to  
6 disprove it, okay?

7                   So try to work that out. I would suggest that  
8 you think it through and then have a discussion to see if  
9 you actually agree on this issue or not because if you  
10 agree, that makes my job easier. But if you still  
11 disagree and you want to file something, I would like to  
12 get something filed in late April -- well, I will just  
13 give you a month. So April 20- -- or perhaps we should  
14 do it sooner, let's say April 19th, all right? So by  
15 April 19th, you'll give me briefing on this issue, so  
16 that either you're going forward with full knowledge or  
17 with zero knowledge, okay?

18                   All right. Anything else? All right. Thank  
19 you everybody.

20                   IN UNISON: Thank you, your Honor.

21                   (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 11th day of April, 2019.

  
Linda Ferrara

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